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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS AND INTERFERENCES

Appellant: Darren E. Pieczynski
Serial No: 10/066,267
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Group Art Unit: 3643
Examiner: Kurt C. Rowan
Title: ICE FISHING TIP-UP DISPLAY

APPEAL BRIEF

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TABLE OF CONTENTS

Page

1.	IDENTIFICATION PAGE
2.	TABLE OF CONTENTS
3.	REAL PARTY IN INTEREST
4.	RELATED APPEALS AND INTERFERENCES
5.	STATUS OF CLAIMS
6.	STATUS OF AMENDMENTS
7.	SUMMARY OF CLAIMED SUBJECT MATTER
10.	GROUND OF REJECTION TO BE REVIEWED ON APPEAL
11.	ARGUMENT
16.	CLAIMS APPENDIX
18.	EVIDENCE APPENDIX
19.	RELATED PROCEEDINGS APPENDIX
20.	REQUEST FOR ORAL HEARING
21.	CONCLUSION

REAL PARTY IN INTEREST

The real party in interest is Darren E. Pieczynski, the applicant.

RELATED APPEALS AND INTERFERENCES:

None.

STATUS OF CLAIMS

Claim 1-7 (cancelled).

Claim 8 (claim on appeal).

Claim 9 (claim on appeal).

STATUS OF AMENDMENTS

No amendment was filed subsequent to Final Rejection.

SUMMARY OF CLAIMED SUBJECT MATTER

The present invention provides a novel and unique ice fishing display device for use with an ice fishing tip-up with a base assembly and a tip-up flag arm mounted to the base assembly.

In accordance with a preferred embodiment of the present invention, the ice fishing tip-up display device comprises: a flashing light source located at one end of an assembly; a tilt switch to determine whether a flag arm is in generally horizontal or generally vertical position; a reflective enclosure of the tilt switch/flashing light source; conductors for carrying electricity from a power source to the flashing light source; a power source and circuitry means to supply power to the flashing light source; and an attaching apparatus to attach to a flag arm of a fishing device (spec. page 4, lines 14-20).

A very important feature of the present invention is that the enclosure is reflective. The reflective material acts as an indicator performing multiple functions. First, when the ice fishing tip-up is in place spanning a hole with the flag down awaiting a fish strike, it is vulnerable to motorized traffic on a frozen lake. In other words, the operator of a motorized vehicle may see the fisherman, but be completely unaware of the locations of the fisherman's equipment. When shined upon by the vehicle's lights, the reflective enclosure will light up, indicating the location of the equipment allowing the operator of the motorized vehicle to steer clear thereof (spec. page 7, lines 13-19).

Another important function of the reflective enclosure is that when the fisherman awaits a fish strike on the tip-up, the fisherman may scan the area with a flashlight or other light-producing device, to verify the locations of the equipment. This is especially helpful when it is time for the fisherman to retrieve and pick up his equipment before leaving the fishing location (spec. page 7, lines 19-22).

Another important function of the reflective enclosure is that it enables the fisherman to ascertain whether the flag position is down or up, by the use of a flashlight or the like device, simply by shining on the tip-up determining the position of the reflective enclosure. This is especially important if the device is unarmed without the power source or if an electronic failure occurs, so that the fisherman can still determined the position of the flag (spec. page 7, line 22-page 8, line 2).

Claim 8 (claim on appeal) An ice fishing display device for use with an ice fishing tip-up with a base assembly and a tip-up flag arm mounted to the base assembly (spec. page 3, lines 10-24; Fig 2) comprising:

- a reflective enclosure (23 or 65) containing a light source (25 or 62) and a tiltable switch (32 or 61) such that said light source (25 or 62) is electrically connected to said tiltable switch (32 or 61), and said reflective enclosure (23 or 65) can be seen by others when shined upon with lights to verify position of said flag arm;

- a power source (20 or 31) detachably mounted to the base assembly, wherein said power source (20 or 31) includes a detachable connection to said light source (25 or 62); and

- an electrical connection (21 or 63) to said light source (25 or 62), tiltable switch (32 or 61) and power source (20 or 31) wherein conductors have connection to said flag arm with removable fasteners (37) along the length of said flag arm,

whereby, when a fish strikes, said tip-up arm is released from a lowered position and said tiltable switch (32 or 61) electrically connects to said power source (20 or 31) to said enclosure (23 or 65) so that said light source (25 or 62) illuminates to signal a user of a fish strike.

Claim 9 (claim on appeal) An ice fishing display device for use with an ice fishing tip-up with a base assembly and a tip-up flag arm mounted to the base assembly (spec. page 3, lines 10-24; Fig. 2) comprising:

a reflective enclosure (42) containing a light source and tiltable switch such that said light source is electrically connected to said tiltable switch (spec. page 9, lines 1-9; Figs. 3, 3A, 3B) and said reflective enclosure (42) can be seen by others when shined upon with lights to verify position of said flag arm;

a power source (41); and

an electrical connection means to said light source, tiltable switch and power source (41) within said reflective enclosure (42),

whereby when a fish strikes, said tip-up arm is released from a lowered position and said tiltable switch electrically connects to said power source (41) to said enclosure (42) so that said light source illuminates to signal a user of a fish strike.

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

1. Whether claim 8 is unpatentable under 35 USC § 103 over Muenchow US Patent 5,979,101 in view of Eppley et al. US Patent 5,067,269.

2. Whether claim 9 is unpatentable under 35 USC §102 as being anticipated by Muenchow US Patent 5,979,101.

ARGUMENT

1. Whether claim 8 is unpatentable under 35 USC § 103 over Muenchow US Patent 5,979,101 in view of Eppley et al. US Patent 5,067,269.

The final OA alleges that: “Muenchow shows a reflective enclosure 25, 35, having a light source 33 and a tiltable switch 29 such that the light source is connected to the tiltable switch. The reflective enclosure inherently can be seen by others when shined up with lights to verify the location of the flag arm. Muenchow shows a power source 31 mounted in the reflective enclosure. Muenchow shows an electrical connection to the light source, tiltable switch and power. Eppley shows a tip-up having a reflective enclosure having a light source 17 and a tiltable switch 22 such that the light source is connected to the tiltable switch”.

The final OA further alleges: “In reference to claim 8, it would have been obvious to provide Muenchow with a remote power source as shown by Eppley et al for the purpose of changing the power source without having to disassemble the reflective enclosure”.

The final OA at page 3 also alleges that “both the housing and the lens of Muenchow must reflect some light or they would not be visible. The lens and housing of Eppley is also reflective. Applicant states that these terms are not used in the specification of Eppley or Muenchow. However, it is inherent in both references that the housings reflect some light or they would not be visible.” Underscoring added for emphasis.

Appellant respectfully traverses the foregoing allegations based on the reasons set forth hereinbelow.

First, it is respectfully submitted that the final OA confuses “visibility” with “reflectivity”.

To “reflect” means: to prevent passage of and cause to change direction, as a mirror reflects light; to bend or fold back; to throw back light or sound. See www.m-w.com/dictionary/reflection.

It is respectfully submitted that the final OA erroneously confuses reflectivity with visibility. In contrast, it is respectfully submitted that those persons skilled in the art know that: reflective items may be visible to some extent even when a light is not directly shined on them; and that a mirror has a front surface which is reflective and a rear surface which is non-reflective but may still be visible. (Underscoring added for emphasis).

Furthermore, it is respectfully submitted that the CAFC as well as those persons skilled in the arts do not use the term “reflective” as being synonymous with “visible”.

For example, see the patent language “a mirror lens having a reflective outer surface and a non-reflective rear surface, the mirror lens comprising a mirror body which terminates in an oval perimetral edge, the edge surrounds the reflective surface and the non-reflective surface of the mirror lens,...” Roscoe, Inc. v Mirror Lite Company, 304 F.3d 1373 (Fed Cir 2002). (Underscoring added for emphasis).

It is respectfully submitted that those skilled in the art know that a reflective item when shined upon by an external light will turn back the light impinging on the reflective item in the direction of the external light. This is quite different than a tree becoming visible during daylight hours, as the viewer does not have to be located in the direction between the tree and the sun for the tree to be visible.

Indeed, claim 8 (as well as claim 9) specifically state that “said reflective enclosure can be seen by others when shined upon with lights to verify position of said flag arm”. (Underscoring added for emphasis).

More particularly, appellant respectfully submits that neither Muenchow light system 25, nor Muenchow waterproof sleeve 35, nor Eppley’s unidentified enclosure are “reflective”

The allegation in the final OA with regard to claim 8 that “the reflective enclosure inherently can be seen by others when shined upon with lights to verify the location of the flag arm” will be dealt with hereinbelow when dealing with the allegation in the final OA with regard to claim 9 which asserts that “Muenchow shows an inherently reflective enclosure partially due to the lens 39 for the LED light 33”, as well as the statement in the final OA on page 3 thereof “it is inherent in both references that the housings reflect some light or they would not be visible”.

Appellant respectfully submits that the person skilled in the art would have no motivation or desire to provide Muenchow with a remote power source as shown by Eppley for the purpose of changing the power source without having to disassemble the enclosure. Indeed, such a combination of teachings would distort Muenchow which teaches away from such a remote power source. It is illogical to maintain that the person skilled in the art would wish to have a remote power source when the power source is local within the waterproof sleeve 35 of Muenchow.

Additionally, it is respectfully submitted that the present invention is in an area of technology which is extremely crowded. See for example Eppley, et al col. 1, line 18-col. 2, line 6, and Muenchow, col. 1, lines 10-43.

In spite of this very crowded area of technology, nevertheless, “there is room for improvement in ice fishing tip-ups”. Muenchow, col. 1, lines 41-42.

It is respectfully submitted that in this very crowded area of technology, improvements, which the non-artisan may view as minor, are still significant and patentable.

The extent of the crowded art, and the improvement brought about by the present invention is described in detail in appellant’s specification, page 2, line 9-page 4, line 20; page 7, line 13-page 8, line 2; page 9, lines 17-20, all portions of which are incorporated herein by reference thereto.

Moreover, appellant respectfully submits it would be contrary to the teaching and purpose of Muenchow to modify its enclosed local power source in exchange for the remote power source as shown in Eppley et al. This flies in the face of the Muenchow teaching.

Also, as alluded to above, the present invention is classified in a very crowded art, and consequently, a very small step forward should be regarded as significant.

Moreover, it is respectfully submitted that the claims on appeal are directed to and solve a different problem than that of the cited references, and that such problem is solved by the features recited in the claims on appeal. None of the cited references are directed to providing a reflective enclosure which can be seen by others when shined upon by lights to verify the position of the flag arm, or to see the device in an unpowered condition.

2. Whether claim 9 is unpatentable under 35 USC § 102 as being anticipated by Muenchow US Patent 5,979,101.

Under 35 USC §102(b), an anticipation based on a single reference can only be made out when all of the elements in the claim are found in the four corners of that reference.

In contrast, the final OA alleges that Muenchow shows an inherently reflective enclosure partially due to the lens 39 for the LED light 33.

Appellant respectfully traverses this contention.

Under the doctrine of inherency, if an element is not expressly disclosed in a prior art reference, the reference will still be deemed to anticipate a subsequent claim if the missing element “is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill”. Cont’l Can Co. v. Monsanto Co., 948 F.2d 1264, 1268, 20 USPQ2d 1746, 1749 (Fed. Cir. 1991). Underscoring added for emphasis.

“Inherent anticipation requires that the missing descriptive material is ‘necessarily present’ not merely probably or possibly present, in the prior art.” Trintec Indus., Inc. v Top-U.S.A. Corp., 295 F3d 1292, 1295, 63 USPQ2d 1597, 1599 (Fed. Cir. 2002) (quoting In re Robertson, 169 F3d 743, 745, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999). Underscoring added for emphasis.

The question is whether one skilled in the art would read the Muenchow patent as inherently disclosing the invention set forth in appellant’s claim 9. That is, whether one skilled in the art would read the Muenchow patent as showing a reflective enclosure.

It is respectfully submitted that there is no evidence in the record to support a finding that one skilled in the art would so read the Muenchow patent.

CLAIMS APPENDIX

8. An ice fishing display device for use with an ice fishing tip-up with a base assembly and a tip-up flag arm mounted to the base assembly comprising:

a reflective enclosure containing a light source and a tiltable switch such that said light source is electrically connected to said tiltable switch, and said reflective enclosure can be seen by others when shined upon with lights to verify position of said flag arm;

a power source detachably mounted to the base assembly, wherein said power source includes a detachable connection to said light source; and

an electrical connection to said light source, tiltable switch and power source wherein conductors have connection to said flag arm with removable fasteners along the length of said flag arm,

whereby, when a fish strikes, said tip-up arm is released from a lowered position and said tiltable switch electrically connects to said power source to said enclosure so that said light source illuminates to signal a user of a fish strike.

9. An ice fishing display device for use with an ice fishing tip-up with a base assembly and a tip-up flag arm mounted to the base assembly comprising:

a reflective enclosure containing a light source and tiltable switch such that said light source is electrically connected to said tiltable switch, and said reflective enclosure can be seen by others when shined upon with lights to verify position of said flag arm;

a power source; and

an electrical connection means to said light source, tiltable switch and power source within said reflective enclosure,

whereby when a fish strikes, said tip-up arm is released from a lowered position and said tiltable switch electrically connects to said power source to said enclosure so that said light source illuminates to signal a user of a fish strike.

EVIDENCE APPENDIX

None.

RELATED PROCEEDINGS APPENDIX

None.

REQUEST FOR ORAL HEARING

None.

CONCLUSION

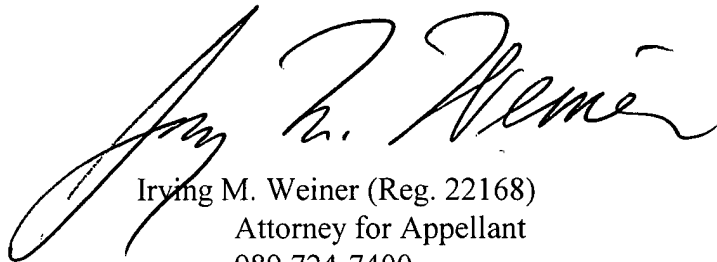
For the foregoing reasons, appellant submits that the rejection of claims 8 and 9 is in error and should be reversed.

This Appeal Brief is accompanied by an Appendix which presents a clean copy of the claims involved in the appeal.

Appellant encloses herewith a form PTO-2038 for the Appeal Brief fee.

Favorable consideration and reversal of the Final Rejection are earnestly requested.

Respectfully submitted,



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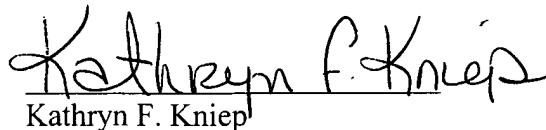
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I hereby certify that the foregoing Appeal Brief and its enclosures were mailed to Mail Stop Appeal Brief - Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on March 13, 2006 by first class mail with sufficient postage to cover the cost.


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